

STATE OF SOUTH CAROLINA  
In the Court of Appeals

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Appeal from the Administrative Law Court  
The Honorable S. Phillip Lenski, Administrative Law Judge  
Case No. 15-ALJ-0015

**SC Court of Appeals**

Appellate Case No.: 2016-000261

TONY MOORE, #188313.....APPELLANT

v.

S.C. DEPARTMENT OF PROBATION, PAROLE  
AND PARDON SERVICES,.....RESPONDENT

**INITIAL BRIEF OF RESPONDENT**

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**ATTORNEY FOR RESPONDENT**

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**STATEMENT OF ISSUES ON APPEAL**

1. Did the denial of the Appellant's parole eligibility violated due process?
2. Was the denial of parole eligibility contrary to the Court opinions of *Miller v. Alabama* and *Aiken v. Byers*?

## STATEMENT OF THE CASE

On December 13, 1994, the Appellant shot the victim with a .32 caliber handgun causing her death. He was ultimately arrested and charged with the offense of murder. On March 23, 1995, upon being found guilty by a jury of his peers, the Appellant appeared before the Honorable Costa M. Pleicones for this offense. He was sentenced to a term of incarceration for the remainder of his natural life.

At the time the Appellant committed this offense South Carolina law allowed an individual serving a life sentence for murder parole eligibility upon the service of twenty years. Prior to him becoming eligible for parole a mandatory pre-parole investigation was conducted by the Parole Board. At the conclusion of this investigation it was discovered that on June 2, 1992, the Appellant was convicted of committing a violent burglary in the second degree (burglary 2<sup>nd</sup>); assault and battery with intent to kill (ABIK); and, accessory before the fact of ABIK. The Appellant committed this prior offense when he was seventeen years of age, and was sentenced pursuant to the South Carolina Youthful Offender Act not to exceed six years incarceration. Each of these prior convictions were classified as violent.<sup>1</sup> Due to these prior violent convictions it was determined that pursuant to South Carolina law the Appellant is not eligible for parole. On February 10, 2015, the Appellant was informed that due to these prior convictions he is currently not eligible for parole.

On March 9, 2015, the Appellant filed a notice of appeal before the Administrative Law Court (ALC). It was the Appellant's position that due to him being a juvenile at the time he

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<sup>1</sup> For purposes of definition under South Carolina law, a violent crime includes offenses of burglary in the second degree (Section 16-11-110(B)); assault and battery with intent to kill (Section 16-3-620); and accessory before the fact of ABIK (Section 16-1-80). S.C. Code Ann. §16-1-60(Supp. 1986).

committed the previous offense, the Board violated due process, and the eighth amendment by denying him parole eligibility.

On January 15, 2016, upon reviewing briefs submitted by both parties, the Honorable S. Phillip Lenski, Administrative Law Court Judge issued his decision. The lower Court decided that application of Section 24-21-640 did not violate his rights under the Eighth Amendment due to the fact he was not a juvenile when he committed the current offense in which he is sentence to life. The ALC decided to affirm the Board's decision to deny the Appellant's parole eligibility.

The Appellant then filed a notice of appeal before this Court. Within his brief he argues that the ALC erred in affirming the decision of the Parole Board, that the permanent denial of parole violates due process, and the statute is not narrow enough to afford him notice that upon conviction he would not be eligible for parole. The Appellant also argues that a denial of parole violates the eighth amendment of the United States Constitution due to him being a juvenile when he committed the previous violent offense.

The Respondent argues that the ALC made the correct decision in affirming the decision of the Board, due to it being no violation of due process in the denial of parole eligibility. The Appellant had an opportunity to present his argument and view any evidence presented to the ALC prior to any final decision. The Respondent will further argue that there exist no violation of the eighth amendment. The Appellant was not a juvenile when he committed the offense he is currently serving; therefore, the Respondent followed the law denying parole eligibility. The ALC made the correct decision affirming the decision of the Respondent. This case should be affirmed by this Court or this appeal be subject to dismissal. The brief supporting the arguments of the Respondent follows.

**1. The Appellant is not eligible for parole due to him currently serving a second conviction for a crime classified as violent.**

The Appellant is currently serving a life sentence for the offense of murder. He has a previous conviction for the offenses of a violent burglary 2<sup>nd</sup>, and ABIK also classified as violent. The South Carolina Code of Laws specifically state:

The [parole] board must not grant, nor is parole authorized to any prisoner serving a sentence for a sentence for a second or subsequent conviction following a separate sentencing for a prior conviction, for violent crimes as defined in Section 16-1-60.

S.C. Code Ann. §24-21-640(Supp. 2015).

In determining whether an offender is a subsequent violent offender, the subsequent crime must have been committed after June 3, 1986, and classified as violent at the time of its commission.

There are a few exceptions, if the subsequent crime was committed between January 1, 1994, and January 12, 1995, the prior crime must have been classified as violent at the time the subsequent crime was committed. With the exception of this window, there exist no ex post facto violation where an inmate is treated as a subsequent violent offender based in part on a prior conviction which was not defined as violent on the date that the prior crime was committed. *Sullivan v. State*, 331 S.C. 479, 504 S.E.2d 110 (1998); *see also, Phillips v. State*, 331 S.C. 482, 504 S.E.2d 111 (1998). This Court has also decided that a prior violent offense committed in another state will not preclude a prisoner from being eligible for parole. *See, State v. Hinton*, 357 S.C. 327, 592 S.E.2d 335 (2005).

The Appellant is currently serving a life sentence for murder, an offense classified as violent. This offense was committed within the above mentioned window; however, his prior violent conviction occurred in 1992, after the establishment of the Omnibus Criminal Justice Improvement Act of 1986, the law that created violent and non-violent classifications. The prior

crimes committed by the Appellant was classified as violent at the time they were committed. His prior crimes also occurred within the state of South Carolina. The Appellant's crime does not come within any of the exceptions; therefore, he is not eligible for parole.

**2. The denial of parole eligibility is not in violation of due process.**

In the South Carolina Supreme Court decision of *Al-Shabbaz v. State*, 338 S.C. 334, 527 S.E.2d 724 (2000). The Supreme Court created a new avenue by which inmates could seek review of a final decision of a state agency in "non-collateral" matters related to a conviction or sentence. The Court has held that an inmate could appeal those final agency decisions to the ALC, and ultimately to the Court of Appeals pursuant to the Administrative Procedures Act. *Al-Shabbaz*, at 376. In *Al-Shabbaz*, the Court recognized that "these administrative matters typically arise in two ways: (1) when an inmate is disciplined and punishment imposed; and, (2) when an inmate believes prison officials have erroneously calculated his sentence; sentence-related credits or custody status." *Id.*, at 369.

In *Furtick v. S.C. Dept. of Probation, Parole and Pardon Services*, 352 S.C. 594, 576 S.E.2d 146 (2002), the Court held that, in order to determine whether an inmate's claim against the Department is entitled review by the ALC under the procedure set forth in *Al-Shabbaz*, it is first necessary to determine whether an inmate has a liberty interest sufficient to require at least minimal due process. *Id.* The Court held that the permanent denial of parole eligibility implicates a liberty interest sufficient to require at least minimal due process. *Furtick*, at 149.

The Appellant argues that since *Furtick* allows the minimal amount of due process that should be the floor not the ceiling. However, the United States Supreme Court has ruled that there is no constitutional on inherent right of a convicted person to be conditionally released before the expiration of a valid sentence. *Greenholtz v. Inmates of the Nebraska Penal and Correctional*

*Complex*, 442 U.S. 1, 99 S.Ct. 2100 (1979). Decisions of the Executive Branch, however, serious their impact, do not automatically invoke due process protection; there simply is no constitutional guarantee that all executive decision making must comply with standards that assure error-free determinations. *Id.*, at 2104. The Appellant argues that there is a fundamental right to be free from government restraint. There is not a fundamental right to be released from incarceration. The permanent denial of parole eligibility only requires minimal due process. That means review, notice given that parole eligibility has been denied, and an ability to review that decision to an impartial Administrative Law Court. All of these measures have been given to Appellant. His case was reviewed by the Board as a possible subsequent violent offender, upon review of his prior indictments and convictions it was determined that he did have a prior violent conviction, which denied him parole eligibility pursuant to statute. He was allowed to appeal this decision to an impartial Court, where the Court and the Appellant was allowed to review the records relied upon to make the determination. If the ALC determined that the Appellant's parole eligibility was revoked in error, they had the ability to reverse the decision and order the Appellant a hearing. They rightfully determined that due to South Carolina law the Appellant is not entitled parole. There has been no violation of due process in of denying the Appellant parole eligibility.

The Appellant also argues that since the Courts has determined that parole eligibility creates a liberty interest that triggers due process. It is his opinion that the denial of parole eligibility implicates a fundamental right which requires strict scrutiny analysis. Legislation restricting or impairing a fundamental right is subject to strict scrutiny in determining its constitutionality under the due process clause. *Treatment and Care of Luckabaugh*, 351 S.C. 122, 568 S.E.2d 338 (2002). The Appellant has the burden of proving this law does meet the standards of strict scrutiny. The party attacking a law on due process grounds bears the burden of proof under either the rational

basis or strict scrutiny test. *Id.*, at 347. The Respondent argues that the Appellant has failed to meet this burden.

The Appellant argues that the continuation of incarceration to deny a person of any freedoms should be considered a fundamental right that requires a strict scrutiny analysis. Even though the incarceration of an individual without being allowed parole can be considered a fundamental right. This right can be denied through law if there exist a compelling state interest. The Appellant argues that the subsequent violent offender is not narrowly tailored but is broad and indiscriminate. The Respondent denies these allegations; however, to insure that the state-created parole system serves the public-interest purposes of rehabilitation and deterrence, the state may be specific or general in defining the conditions for release and the factors that should be considered by the parole authority. *Greenholtz*, at 2104. The Respondent disagrees that the subsequent violent offender law is broad and indiscriminate. It is clear that if a prisoner is currently serving a sentence for a violent offense which are specific crimes listed in South Carolina law, that a person would not be eligible for parole if this is his second violent offense conviction. The Appellant argues that there are no individualized assessment of danger, potential recidivism, ability to be rehabilitated, or any other factors related to sentencing. The General Assembly determined that an inmate who have committed subsequent violent crimes should not receive an opportunity to be released early from incarceration. This was created in order to protect the citizens of South Carolina. There is such a high rate of recidivism and the acts of these individuals are so heinous in order to protect the citizens which is a compelling state interest they should not have an early release from incarceration.

The Appellant also argues that the continuation of incarceration to deny a person of any freedom should be considered a fundamental right that requires strict scrutiny. *Luckabaugh*, at

347. The Appellant believes that the continued incarceration is a denial of a fundamental right. This right can be denied through law if there exist a compelling state interest. To survive strict scrutiny the Act must meet a compelling state interest and be narrowly tailored to effectuate interest. *Washington v. Glucksburg*, 521 U.S. 702, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997). The safety and protection of the citizens of South Carolina is a distinct state interest that must be protected by the General Assembly. See, *Kimbree v. Jolog Sportswear, Inc.*, 239 S.C. 415, 123 S.E.2d 524 (1962)(Supreme Court ruled that tortious conduct is of a compelling state interest affecting the public welfare and security of its citizens, so the state law is not excluded by the National Labors Relations Act.) There are individuals who have conducted heinous crimes or have long criminal histories, who must be kept from the general public, the Appellant is one such person. On November 10, 1991, the Appellant at the age of 17 committed a burglary by breaking into an Ace Hardware Store. Three days later he aided in the shooting of an individual during the commission of an armed robbery. Due to his age at the time these crimes were committed, the sentencing Judge sought fit to allow the Appellant be given a reduced sentence under the Youthful Offender Act (YOA). While on YOA parole less than three years later he commits a murder. These types of Defendant's prompt the General Assembly to create laws allowing a person having committed multiple violent crimes in separate occasions not allowed parole eligibility. This law was created in order for the community to be protected from individuals such as the Appellant who have committed multiple violent crimes. This law is not a violation of due process, because it meets a compelling state interest.

The Appellant also argues that this decision to deny eligibility is based on nothing more than a review of records. The Respondent disagrees, the Appellant was convicted by a jury of his peers where the prosecution had to prove his guilt beyond a reasonable doubt. He was represented

by competent counsel, and the sentence given was legal. He admitted his guilt in all his previous offenses and sentenced under the Youthful Offender Act. The Appellant exercised his right to due process, however, due to his previous convictions he is not eligible for parole.

The Appellant alleges he failed to receive procedural due process. Procedural due process requires both notice and a meaningful opportunity to be heard. *Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 636 S.E.2d 598 (2006). A penal statute offends due process only when it fails to give fair notice of the conduct it proscribes. *State v. McKnight*, 352 S.C. 635, 576 S.E.2d 168 (2003). In its order the ALC mentions two cases *Thomas v. Davis*, 192 F.3d 445 (4<sup>th</sup> Cir. 1999), and *McKnight*. By the use of these cases the ALC rightfully determined that Due process is satisfied where the law provides fair notice of the conduct forbidden by law and the penalty that applies, such that a person of ordinary intelligence could understand. The Appellant argues that these cases do not apply due to there be not a constitutional issue with the prior convictions. There are no constitutional issue with the Appellant's prior offenses neither. The Appellant was not adjudicated as a juvenile, he was convicted in General Sessions Court as an adult. The statute is clear, any individual **convicted** of a prior criminal offense classified as violent cannot be eligible for parole. This law was created in 1986 well before either offense was committed by the Appellant. Therefore, he had ample knowledge, and warning that once he committed the prior violent offense, another violent conviction would deny parole eligibility.

The State has a compelling interest in the denial of a person who have committed multiple violent offenses. The denial of parole is tailored to the protection of the community from a person who is a danger, so this statute satisfies this interest by not allowing them back into the community. Since there exist a compelling state interest, which is satisfied by the creation of this statute, there exist no violation of due process.

**3. The denial of parole eligibility was not in violation of the eighth amendment.**

The Appellant argues that due to the fact he was seventeen when he committed his previous offenses, the use of those offenses to deny parole eligibility should be considered cruel and unusual in violation of the eighth amendment. Pursuant to the United States Constitution, “excessive bails shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. Const. amend. VIII.

The South Carolina Supreme Court reviews three factors in assessing the proportionality of the sentence for Eighth Amendment purposes: (1) the gravity of the offense compared to the harshness of the penalty; (2) sentences imposed on other criminals; (3) sentences for the same crime in other jurisdictions. *McKnight*, at 651. Within his brief the Appellant cites the United States Supreme Court case of *Miller v. Alabama*, 132 S.Ct. 2455 (2012). In *Miller*, the United States Supreme Court ruled that a mandatory life without parole sentences for those under eighteen at the time of their crimes violates the eighth amendment. The *Miller* case does not apply to the present case. In *Miller*, the Appellant committed murder at the age of fourteen, and sentenced to life imprisonment without the possibility of parole. In the present case the Appellant was age twenty when he committed his offense. The Appellant was not a juvenile, he was sentenced as an adult. *See, State v. Standard*, 351 S.C. 199, 569 S.E.2d 325 (2002)(Sentence of life imprisonment under the two-strikes law for a 15 year old defendant at the time he committed the triggering offense of armed robbery for which he was tried and adjudicated as an adult does not violate the eighth amendment.)

For an offense to be prohibited under the eighth amendment the sentence must be grossly out of proportion to the severity of the crime. *Curtis v. State*, 345 S.C. 557, 549 S.E.2d 591 (2001). The Appellant was sentenced to life for the offense of murder. He took the life of another person

so the sentence of life is not out of proportion of the severity of the crime. The Appellant argues that since the aggravator occurred when he was seventeen, the life without parole sentences should be considered cruel and unusual punishment in violation of the eighth amendment. The denial of parole due to his prior offenses does not violate the eighth amendment, regardless of those prior crimes occurring when the Appellant was seventeen. Under recidivist sentencing schemes, the enhanced punishment imposed for a present offense is not viewed as an additional penalty for the earlier crimes, but instead as a stiffened penalty for the latest crime, which is considered to be an aggravated offense because it is a repetitive one. *State v. Williams*, 380 S.C. 336, 669 S.E.2d 640 (2009). Since the murder offense occurred when the Appellant was age twenty, the denial of parole cannot be considered a violation of the eighth amendment.

The Appellant also attempts to apply the South Carolina Supreme Court case of *Aiken v. Byers*, 410 S.C. 534, 765 S.E.2d 572 (2014), which the South Carolina Supreme Court determined that *Miller* can be applied retroactively, not allowing defendants who committed their crimes as juveniles, to serve a life sentence without parole. The major difference between *Aiken*, and the present case is that the Appellant was not a juvenile when he committed the current offense, he was age twenty. He is currently doing a life without parole sentence due to his prior record; however, those are not the sentences he is presently serving, *Aiken* does not apply.

**4. A possible remedy does exist that could result in the release of the Appellant from incarceration.**

The Appellant argues that he is currently being unlawfully being incarcerated for a period of life without the possibility of parole. Even though that is correct there does exist a remedy that could result in the Appellant one day released from incarceration. The ALC made the correct determination that the United States nor South Carolina Supreme Courts determined that sentencing a juvenile to a sentence of life without parole is automatically considered as cruel and

unusual punishment. They concluded instead that such a sentence must not be mandatory and may not be imposed without an individualized hearing that considers the defendant's youth and its effect on capability. *Aiken*, 410 S.C. at 538-39, 765 S.E.2d at 574-75. The ALC was correct in distinguishing *Miller* and *Aiken* to the present case. If this Court disagrees there is a remedy that will cause a determination of the Appellant's youth at the time the offense to possibly grant a release.

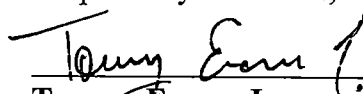
Pursuant to South Carolina law an inmate can be considered for a pardon before a parole eligibility date only when he can produce evidence comprising the most extraordinary circumstances. S.C. Code Ann. §24-21-950(A)(4)(Supp. 2015) The granting of a pardon means that an individual is fully pardoned from all the legal consequences of his crime and of his conviction, direct and collateral, including the punishment, whether of imprisonment, pecuniary penalty or whether else the law has provided. S.C. Code Ann. §24-21-940 (Supp. 2016). So an individual who has received a pardon would be released from incarceration. This determination would be made by the Department after any review of evidence provided by the Appellant, the prosecution, and consideration by the victims. This establishes the existence of the review provided in both the *Miller* and *Aiken* decisions. The Appellant may argue that his chances of receiving a pardon are slim, however, no decision exist that states the opportunity should be guaranteed or highly likely. There just need to exist an opportunity.

The Respondent is not conceding that the ALC was correct in their determination; however, the Respondent would like the Court be aware that a remedy does exist for the possible future release of the Appellant pursuant to South Carolina law.

**CONCLUSION**

Based on the above referenced reasons the ALC has not committed an error in law; therefore their decision to dismiss this appeal was correct. The Respondent respectfully request this Court to affirm the decision of the ALC.

Respectfully submitted,



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